BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN RE:	)	
	)	
KNOX COUNTY BOARD OF EDUCATION,	)	
	)	
Petitioner,	)	
	)	
	)	No. 99-27
vs.	)	
	)	
[redacted]	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Howard W. Wilson
Administrative Law Judge
6 Public Square, North
Murfreesboro, Tennessee 37130

Parent
[redacted]

Attorney for School District
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[To protect the confidentiality of the minor student, [redacted] will be referred to as "R" on all remaining pages of this decision.]

FINAL ORDER
CASE NO.: 99-27

A due process hearing was requested by Knox County Board of Education regarding a student in the school system by the name of R on April 19, 1999. A telephone pre-trial conference took place on Friday, May 21, 1999 with Counsel for the Petitioner, Knox County Board of Education and the parent of the respondent. The parties agreed to hold the hearing on Friday, June 11, 1999 at the Commission Conference Room, Room 640 of the City County Building in Knoxville Tennessee. The Hearing was "Open" at the request of the parent. The 45 day time line was waived by agreement of both parties through the Agreed Order issued on June 1, 1999.

I. Findings of Fact

R is a "child with a disability" as defined under the Individuals with Disabilities Education Act. The child is currently identified as Learning Disabled (LD). R has received special education services since he was in the first grade. (Ex. 1, p. 93). During the beginning of the second grade, an IEP Team (formerly M Team) recommended that R undergo an Attention Deficit Hyperactivity Disorder (ADHD) evaluation. (Ex. 1, pp. 101, 107, and 178)

University of Tennessee Developmental and Genetics (UT) performed a medical evaluation for ADHD on R in December, 1992. (Ex. 1, pp. 90, 174). Following the evaluation, UT diagnosed R as ADHD and recommended that he take the drug Ritalin.

(Ex. 1, pg. 174). However, R's father stated in writing that he did not want his son on medication for ADHD. (Ex. 1, p. 50).

On May 1, 1995 R was re-certified as learning disabled. (Ex. 1, pp. 82 and 162). Because R continued to exhibit symptoms of ADHD, his father agreed to have him evaluated. (Ex. 1, p. 162). On May 24 and June 1, 1995 Mark H. Waugh, Ph.D. performed a clinical evaluation on R. (Ex. 1, pp. 74-77). Dr. Waugh concluded that R exhibited symptoms of ADHD. Knox County Schools still needed a medical doctor's diagnosis of ADHD to certify R for "other health impairment," as required by Tennessee Regulations. (Ex. 1, p. 157)

On November 17 1995 Robert Deichert, MD recommended and prescribed Ritalin for R and confirmed ADHD, but the schools did not obtain this information until January, 1996. (Ex. 1, p. 81 and 154). During this period of time, a release for medical records was sent to Boulevard Family Care Group to obtain the medical documentation of the ADHD diagnosis. (Ex. 1, p. 23).

The school district received Dr. Deichert's documentation from Mr. [redacted] at a January 4, 1996 IEP Team meeting. (Ex. 1, p. 154). The purpose of that meeting was to address the possession of a knife at school by R. Upon receipt of this additional documentation regarding ADHD from Dr. Deichert, R was additionally identified as Health Impaired along with Learning Disabled. (Ex. 1, p. 79). At this IEP Team meeting, R's father consented to the administration of Ritalin at school (Ex. 1, p. 81). However, the following school year, R did not receive the medication at school but instead the father reported that R received the medication at home. (Ex. 1, p. 152).

R has a history of exhibiting impulsive behavior, and the school district has developed and implemented numerous behavioral support programs for the student. R first began exhibiting behaviors that warranted behavioral objectives and plans while he was in the first grade. (Ex. 1, p. 101). The objectives and plans for that year were addressed in R's Individualized Education Program (IEP) and continued in each IEP until he reach the sixth grade. (Ex. 1, pp.180, 156, 164, 169 and 175).

In 1996, when R entered the sixth grade, a specific Behavior Management Program was implemented in addition to his IEP. The Behavior Management Program was very specific and identified expectations for the student, the consequences for failure to adhere to the expectations and the rewards R could expect to receive if the expectations were met. (Ex. 1, p. 151).

In 1997 another Behavior Management Program was developed and later modified twice due to the ineffectiveness of the original plan demonstrated by the continued disruptive behavior of R. (Ex. 1, p 136). The second modification included a list of consequences for continued disruptive behavior including placement at Richard Yoakley Alternative School. Shortly after the plan was developed, R was transferred to the Alternative School where R made satisfactory progress. (Ex. 1, p. 134). By the end of the 1997-98 school year R's behavior had improved and he was allowed to return to Bearden Middle School to finish the school year. (Ex. 1, p. 125).

In school years, 1996-97 and 1997-98 R was involved in many episodes of misbehavior. These behaviors were typified by verbal and physical aggression toward

authority figures and students and non-compliance with rules. (Ex. 2). R was disciplined, ranging from in-room isolation to out of school suspension. During both school years, R was never suspended for more than 10 schools days within a school year as per the policy of Knox County Schools. (Tr. 52).

During the Fall of 1998, R began to exhibit behavior of increasing severity at Bearden Middle School. Specifically, on January 20, 1999 R and two other boys were involved in an incident that required the response of several teachers and principals. (Tr. 54; Ex. 2, pp. 136D-139D). After a chase through the school, R was apprehended by three teachers and the principal. While the teachers were attempting to control the situation R screamed obscenities at teachers, struggled, and acted aggressively both physically and verbally. The principal and another assistant principal observed that R was a danger to himself and others and decided to invoke a physical restraint. (Tr. 56; Ex. 2, pp. 136D-139D). Eventually it took the principal and three large male faculty members to restrain R. (Tr. 57; Ex., 2 pp. 136D-139D). After several minutes of restraint, R was calm enough to talk to and was convinced to walk calmly to the principal's office. (Tr. 59, Ex. 2, pp. 136D-139D). The school district has attempted to hold an IEP Team meeting to conduct a manifestation determination but determined that additional testing was needed. (Tr. 137; Ex. 2, pp. 136D-139D).

R is currently due for a reevaluation to determine whether Knox County Schools should continue to designate R as learning disabled and health impaired. Knox County first requested permission to reevaluate R on September 14, 1998. (Ex. 1, p. 195). R's father agreed to give permission and the school psychologist performed her evaluations

As part of the evaluation, R's father was required to complete an ADHD questionnaire (Tr. 138; Ex. 1, pp. 63-70). The father's portion has not been received by the school district as of the date of this Hearing. (Tr. 138; Ex. 1, p. 70).

At the IEP Team meeting on January 15, 1999, Knox County School officials again noted that the clinical evaluation needed to be completed for a complete understanding of R. In addition to the evaluation completed by the school psychologist, the school district needed an evaluation by a psychiatrist to determine whether R's ADHD still exists or not, which would determine whether R remains eligible for the health impaired designation. (Tr. 137). At the January 15, 1999 IEP Team meeting, R's father indicated that he did not understand his rights. To ensure that R's father fully understood his rights, the "Rights of Children with Disabilities and Parental Responsibilities" Booklet was described in detail to the father. School officials spent over two hours going over the Booklet most particularly reevaluation, mediation and due process (Tr. 156; Ex. 1, p. 117). At the conclusion of the detailed explanation, the father indicated, by initialing, that he understood his rights. (Tr. 156; Ex. 1, p. 117).

The January 15, 1999 IEP Team meeting was continued on February 5, 1999 where permission to evaluate was signed and a clinical evaluation was to be scheduled. (Tr. 160; Ex. 1, pp. 115 and 71). On April 8, 1999, the parent was notified that a clinical appointment had been missed. (Tr. 121; Ex. 1, p. 9). On April 16, 1999, another IEP Team meeting was held to discuss the completing of the clinical evaluation. (Ex. 1, p. 4). An impasse resulted at the meeting and the school district requested mediation to resolve

the dispute. (Tr. 122, Ex. 1, pp. 2-4). On April 23, 1999, the parties mediated the issue of evaluation. (Ex. 1, pp. 2-4)

The school district requested a Due Process Hearing on April 23, 1999. Following this request R's father agreed to have R evaluated and two appointments were immediately scheduled. (Tr. 122; Ex 1, pp. 241-243). R's father failed to honor the agreement (Tr. 123; Ex. 1, p. 240).

II. Issue

Is the Knox County Board of Education entitled to perform an evaluation over the objection of the parent in order to fulfill its obligation to complete a reevaluation in accordance with IDEA to provide FAPE to R.

III. Conclusions of Law

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 USC 1400 et seq. Under the Act, a student who is eligible for special education because of a disability is to be provided a "free appropriate public education" (FAPE) consisting of special education and related services. 20 USC 1401(a)(18). To this end, the Act requires that for each disabled student the District develop a curriculum tailored to the unique needs of the disabled child by means of an individualized education program (IEP). Cleveland Heights-University Heights City School District v. Boss, 18 IDELR 507 (6th Cir. 1998). The development and implementation of the IEP are the cornerstones of the Act. Honig v. Doe, 484 U.S. 305, 311, 108 S.Ct. 592, 597-98, 98 L.Ed.2d 686 (1988)

In the seminal case of Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), 102 S.Ct. 3034, 73 L.Ed.2d 690, the United States Supreme Court considered the meaning of the requirement of a "free appropriate public education." Interpreting the provisions of the what is now known as the IDEA, the Supreme Court said that a free appropriate public education (FAPE) consists of educational instruction specially designed to meet the unique needs of the child with a disability, supported by such services as are necessary to permit the child "to benefit from the instruction." Id. at 188-189.

Before FAPE may be provided to a student, the student must be evaluated in all areas of suspected disability. Only though effective and accurate assessment and evaluation can an IEP be developed which will provide FAPE. [IDEA, (as amended, 1997) 1414 (d)]

The IDEA requires a school district to notify a student's parent in writing if it intends to begin or to change the student's identification or category as a "child who is disabled", to conduct an evaluation or reevaluation, or to begin or change a child's placement. 34 CFR 300.504(a). The 1997 amendments to the IDEA further requires parental consent prior to conducting a reevaluation. [IDEA (as amended, 1997) 1414(c)(3). Consent must be "informed consent". [IDEA (as amended, 1997) 1414(a)(1)(C) and 1414(C)(3)]. Informed consent includes explanation of relevant information related to evaluations, reevaluations, placement, in the native language of the parent and that consent is voluntary.

A school district may ask for a Due Process Hearing to gain consent to complete an evaluation of a child when the parent refuses to grant consent. [IDEA, as amended, 1997) 1414(a)(1)(c)(ii)]. See also Board of Educ. of the Middle County Sch. Dist, 20 IDELR 1100 (SEA N.Y. 1994) and Des Moines Public School, 16 EHLR 1166 (SEA Iowa 1990)] Further if the parent revokes consent the school district may use "formal means, such as a due process proceeding, if necessary to resolve the revocation of consent." [Letter to Grant, 17 EHLR 1184 (OSEP 1991)]. An Administrative Law Judge or a Court may override a parent's refusal to consent to a proposed action on the part of a school district. 20 USC 1414(a)(1)(c)(ii).

While this is an IDEA case, Section 504 of the Rehabilitation Act of 1973 authority has been cited in the initial Memorandum from the State Department of Education as applicable law. The Office for Civil Rights (OCR) of the United States Department of Education takes a similar stance with reference to instances where parents wish to withdraw consent and the school district believes the student continues to need a service or evaluation. In Letter to Vier, 20 IDELR 864 (OCR 1993), OCR stated that

> if a child is receiving Section 504 services and the parents subsequently withdraw their consent to the provision of these services, then the district may not simply accede to the parent's wishes, but rather, must take the parents to a hearing under Section 504, if the district continues to believe that the services are necessary.

20 IDELR at 865, accord Dyersburg (TN) City Sch. Dist., EHLR 353:164 (OCR 1988).

Parallel is drawn in this case where the father refuses to consent to an reevaluation of services and the school district continues to believe that the services are necessary.

Evaluations are extremely critical for the proper identification of a child. The district must use a variety of assessment tools and strategies to gather relevant information that may assist in determining the disabilities of the child and also to develop the content of the child's IEP. [IDEA (as amended, 1997) 1414(b)(2)(A)]. Such assessments tools must provide relevant information that directly assists the IEP Team in determining the educational needs of the child [IDEA (as amended, 1997) 1414(b)(3)(D). Information must include information provided by the parents. [IDEA (as amended, 1997) 1414(b)(2)(A)].

Both federal and state regulations promulgated to carry out the IDEA's mandates require that a reevaluation be conducted every three years, or more frequently "if conditions warrant, or if the child's parent or teacher requests an evaluation." See also Board of Education of Myrphysboro v. Illinois Board of Education, 21 IDELR 1046 (7th Circuit, 1994)

Every circuit court to address the issue has held that 34 CFR 300.534(b) [old regulations] and now 34 CFR 300.536 [March 12, 1999] grants schools a right to conduct a three year reevaluation. These courts reason that because the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation of the student, and the school cannot be forced to rely solely on an independent evaluation conducted at the parent's behest. Andress v. Cleveland Independent School District. 22 IDELR 1134 (5th Cir. 1995). As the Ninth Circuit, in a persuasive decision, has held if parents want their child to receive special education services from a school

district, they are "obligated to permit" a triennial assessment. (Gregory K. v. Longview School District, 87 EHLR 558:284 (9th Cir. 1987).

The barring of nondisclosed evidence within the five day rule is discretionary. Section 1415(f)(2)(B) (IDEA, as amended, 1997) states, that "[a] hearing officer **may** bar any party that fails to comply with subparagraph (A) [disclosure within required number of days prior to hearing] from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party." (emphasis added) This provision is consistent with prior law and practice under which a hearing officer could bar any evidence which had not been exchanged five days prior to the hearing.

IV. Conclusions Applying the Law

In this case the parent has refused to consent to a special education reevaluation and a clinical evaluation proposed by Knox County Board of Education. When the parent continued to refuse consent to the evaluation, the school district continued to provide services through an IEP and sought assistance through many avenues including mediation.

Knox County Schools has taken every reasonable and timely step available to the school district provided under state and federal special education laws. Knox County Schools has gone into excruciating detail to explain the legal requirements for consent to the parent along with several hours of explanation of the other procedural safeguards of IDEA. Further the school district provided the telephone number of at least one advocacy group to assist the parent.

The school district has not chosen to avail itself of reporting this lack of cooperation by the father to the Department of Youth Services. While it could have been argued by the school district that refusing to allow for proper evaluations borders on child neglect, the school district has chosen to remedy the situation through all of the legal channels of IDEA. The school district has held repeated IEP Team meetings to gain informed consent, it has scheduled doctor appointments for R and even sent written reminders to the parent, it has entered into Mediation to remedy the situation and now has had to resort to a Due Process Hearing to demonstrate the critical need for a complete and thorough evaluation. The school district is applauded for its patience, forbearance and restraint in its attempt to gain a reevaluation.

The Court would be remiss if it did not make a comment regarding the objections filed by the parent regarding the exchange of documents in a timely fashion. The father has claimed that he never received the collective exhibits mailed by the school district at least 5 business days before the hearing. During the pre-hearing conference and subsequent Agreed Pre-Hearing Order (which the father signed), the father understood his rights and responsibilities regarding the exchanging of documents and witness list. The parent did not contact the school district nor did the parent attempt to contact this Administrative Law Judge when he did not receive a copy of the school district's collective exhibits. The parent further did not exchange nor notify the school district or the Court of his decision not to provide documents or his own witness list. The Court has taken notice of the objection and now overrules the objection. However, the Court, where possible, has used only documents that previously the parent had signed

The school district has an obligation under IDEA to continue to provide needed special education and related services in the event that the parent withdraws consent for services or an reevaluation. The school district is required to do as Knox County Board of Education has done in this case and take the parent to a Due Process Hearing.

The school district has demonstrated through this Hearing that the district must complete an evaluation of R to determine if the significant behavior problems in the classroom could be related to his disability. The implementing regulations promulgated pursuant to the IDEA support the conclusion that the school has a right to conduct a three-year reevaluation, and the federal regulations (both new and old) require the child to be assessed in all areas related to the suspected disability. 34 CFR 300.532(g). Therefore in this case, the school district has a duty to conduct a three year reevaluation to assess all areas related to R's suspected disabilities, and this right of R will not be limited by the parent's refusal to consent to the essential evaluations.

V. Order

1. It is hereby Ordered that the parent of R give consent to the evaluations requested by the Knox County School District for purposes of reevaluation and for manifestation determination.

2. It is furthered Ordered that the parent cooperate in the evaluations for R and to work with the school district in developing an appropriate IEP when the evaluations are completed.

2. It is further Ordered that if the parent refuses to grant consent for the evaluations needed, the school district has the direct authority of this Order to conduct or have conducted the appropriate evaluations so that R may receive a Free Appropriate Public Education.

THIS DECISION IS BINDING UPON ALL PARTIES UNLESS APPEALED. Any party aggrieved by the findings and decision may appeal to the Davidson County Chancery Court of the State of Tennessee, or may seek review in the United States District Court for Tennessee. Such an appeal must be taken within sixty (60) days of the entry of final order in non-reimbursement cases and within three (3) years in cases involving reimbursement of educational costs and expenses. In appropriate cases, the reviewing Court may direct this Final Order be stayed.

ENTERED, this the 5th day of August, 1999.

Howard W. Wilson 014007
Administrative Law Judge
6 Public Square, North
Murfreesboro, TN 37130

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Final Order was mailed on the 5th day of August, 1999, to the parent of the child, [redacted] Knoxville, Tennessee 37919; and to the counsel for the school district, Ms Susan E. Crabtree, Esquire, Deputy Law Director, Knox County Law Department, Suite 612, City County Building, 400 Main Ave., Knoxville, Tennessee 37902; and to the Division of Special Education, State Department of Education, Nashville, Tennessee 37243-0375.

Howard W. Wilson